

Geoffrey Wilson, Trustee in Bankruptcy
10580 N. McCarran Blvd., Suite 115-332
Phone: (775) 787-0378
Fax: (866) 595-6238
e-mail: trustgeoffrey@gmail.com

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

IN RE:

Case No. BK-N14-51072-BTB
Chapter 7

Jeremy P. Keele

Debtor(s)

**CHAPTER 7 TRUSTEE'S MOTION TO
(A) APPROVE AN AUCTION AND
SHORT SALE OF REAL PROPERTY
FREE AND CLEAR OF LIENS,
CLAIMS, ENCUMBRANCES, AND
INTERESTS PURSUANT TO 11 U.S.C.
§ 363(B), (F), AND (M), (B) BID
PROCEDURES, (C) SURCHARGE
AGREEMENT BETWEEN SECURED
LENDER AND THE ESTATE, (D)
SECURED LENDER'S RIGHT TO
CREDIT BID, AND (E) OTHER
RELIEF; AND PAYMENT OF REAL
ESTATE COMMISSION AND
ESCROW COST**

HEARING DATE: April 8, 2015
HEARING TIME: 10:00 AM

Geoffrey Wilson, Chapter 7 Trustee (the "Trustee") duly appointed Chapter 7 Trustee for the above referenced debtor (the "Debtor") pursuant to Sections 105 and 363 of the Bankruptcy Code hereby files this motion ("Motion") for entry of an order for authority to sell certain real property free and clear of all liens, encumbrances, and interests. In support thereof, the Trustee respectfully states as follows:

JURISDICTION

1
2 1. This Court has jurisdiction to consider this Motion pursuant to
3 28 U.S.C. §§ 157 and 1334. This matter is a core proceeding within the meaning of
4 28 U.S.C. § 157(b)(2)(A), (M), (N), and (O).
5

6 2. Venue is proper before this Court pursuant to 28 U.S.C. §§1408 and 1409.

7 3. The basis for the relief requested are 11 U.S.C. §§ 363(b), (f), and (m),
8 Federal Rules of Bankruptcy Procedure 2002 and 6004.

9
BACKGROUND

10 4. On 6/16/14, the Debtor commenced this case by filing a voluntary petition
11 for relief under Chapter 7 of the United States Bankruptcy Code (the "Petition Date").
12

13 5. Geoffrey Wilson is the duly appointed and qualified interim Chapter 7
14 Trustee.

15 6. The Trustee held and concluded the 341 meeting of creditors on July 24,
16 2014.

17 7. The Debtor/Debtors scheduled a 100% ownership interest in the real
18 properties:
19

20 380 Brooks Avenue, Rochester, NY 14619

21 351 Augustine St., Rochester, NY 14613

22 129 Hazelwood Ter., Rochester NV 14609

23 (the "Property")
24

25 8. The Debtor/Debtors scheduled the Property as having value and liens of:

26 380 Brooks Avenue, Rochester, NY 14619; \$72,272, \$75,684

27 351 Augustine St., Rochester, NY 14613; \$65,803, \$36,127

28 129 Hazelwood Ter., Rochester NV 14609; \$33,234, \$22,028

1
2
3 9. The Trustee, after review of, among other things: (a) the Court file in this
4 case, a current title report provided by the Secured Lender as well as a brokers opinion on value
5 of the Property provided by the Secured Creditor, determined that an online “short sale” auction
6 of the real property, in cooperation with and agreement of the Secured Creditor, is the best way
7 for the estate to realize any benefit from the Property and generate any value for the estate.
8

9 10. In the event that the Secured Creditor is the winning bidder by credit bid, it
10 shall either pay the Real Property Taxes at closing or take title subject to the Real Property
11 Taxes. In the event that the winning bidder is not the Secured Creditor, the Secured Creditor
12 agrees to pay the Real Property Taxes at closing in addition to the surcharge.
13

14 11. The Secured Creditor has represented and warranted that it possesses a valid,
15 perfected, enforceable and unavoidable first mortgage lien on the Property (the “Secured
16 Creditor Indebtedness”).
17

18 **RELIEF REQUESTED**

19 12. The Trustee requests the entry of an order pursuant to Section 363 of the
20 Bankruptcy Code approving the sale of the Property by Auction (as defined below), using the
21 services of ADC (as defined below), free and clear of all liens, claims, encumbrances, and
22 interests. As a material inducement to the Trustee’s decision to pursue the proposed sale, the
23 Secured Creditor consents to the Property’s sale and the creation of a carve-out fund (the “Carve-
24 Out Fund”) that will provide for the costs of this case to be paid and provide a recovery for other
25 creditors. The Trustee requests that any creditor (other than the Secured Creditor) asserting an
26 interest or secured claim against the Property be required to assert no later than 5 days prior to
27 the hearing on the instant Motion, and substantiate the basis for such asserted interest or secured
28

1 claim, or the Court will authorize the sale of the Property free and clear of any such asserted
 2 interest or security interest, with such claims, at best, being treated as a general unsecured claim.

3 **BASIS FOR RELIEF**

4 **A. The Auction and Sale of the Property Should Be Approved**

5
 6 14. The Trustee seeks the Court's authority to sell the Property free and clear
 7 of all liens, claims, encumbrances, and interests, but otherwise "As-Is, Where-Is" and without
 8 representations or warranties of any type, express or implied, being given by the Trustee and
 9 his/her professionals, pursuant to the Auction procedures described below.

10 15. Pursuant to Section 363(b) of the Bankruptcy Code, a trustee, after notice
 11 and hearing, may use, sell, or lease property of the Debtor's estate other than in the ordinary
 12 course of business. The Court should approve the sale if the Trustee can demonstrate a sound
 13 business justification for the sale and if the sale process is fair, open, and reasonable. *See Official*
 14 *Comm. Of Unsecured Creditors of LTV Aerospace & Defense Co. v. LTV Corp. (In re*
 15 *Chateaugay Corp.)*, 973 F.2d 141, 143 (2d Cir. 1992); *see also In re Sarah's Tent, LLC*, 396
 16 B.R. 571, 573 (Bankr. S.D. Fla. 2008). Further, Bankruptcy Rule 6004(f) contemplates sales
 17 outside of the ordinary course of business made by public auction.
 18

19
 20 16. The Trustee, through the services of Auction.com ("ADC"), intends to
 21 offer the Property for sale through an online auction (the "Auction") following a 21-day multi-
 22 channel marketing campaign with marketplace exposure on Auction.com, Trulia and Zillow.
 23 During the 21-day marketing period, Omer Kapic (the "Listing Agent") will also list the Property
 24 on the Multiple Listing Service and hold at least two open houses, to the extent possible. The
 25 Auction of the Property will commence after the 21-day marketing period per the advertised and
 26 applicable start and end dates/times. If the Property receives a bid that is sufficient to meet the
 27
 28

1 reserve price¹ then the Property will be sold to the winning bidder. If the reserve is not met by
2 the end of the first Auction in which the property is placed, ADC will then advertise for a
3 second 7 day period and place the property for auction again to commence one week later. If the
4 reserve price is not met at the second auction, ADC will advertise and commence a third Auction
5 one week later. In summary, unless the reserve price is met, ADC will run three consecutive
6 Auctions in three consecutive weeks in order to provide the Property with sufficient exposure to
7 the marketplace. If the reserve price is not met at the third auction, the Secured Creditor will
8 then utilize its right to purchase the Property by credit bid in the amount of the Reserve Price.
9 As part of this process, there will be auction procedures, described below, to maximize the value
10 of the Property.
11

12
13 17. Given the auction procedures outlined herein, including but not limited to
14 online marketing and the retention of an independent real estate broker as well as the online
15 auction company, the Trustee believes that the proposed Auction will facilitate a sale that will
16 produce reasonable sale price that will serve the best interests of the bankruptcy estate and its
17 creditors. As such, the Trustee, in the exercise of his/her business judgment, submits that the
18 sale price resulting from the Auction will be fair and reasonable.
19

20 18. The Trustee and ADC will use the following procedures to conduct the
21 Auction and sale of the Property.

- 22 • **Property to be Sold:** The Property that is offered at the
23 Auction shall be sold pursuant to Section 363 of the Bankruptcy
24 Code free and clear of all liens, claims, encumbrances, and
25 interests, but otherwise in “As-Is, Where-Is” and without
26 representations or warranties of any type given by the Trustee and
27 his/her professionals.

28 ¹ The Trustee shall be advised of the amount of the Reserve Price prior to the Motion being filed, and will be provided a complete bidding history of the auction process, including the identity of each registered bidder, and to the extent necessary to protect the integrity of the process, any principals of any corporate bidder, and amounts of each successive bid.

1 • **The Auction Date:** The first “Auction Date” will be a date
2 selected by ADC that is at least 21 days following the entry of an
3 order approving this Motion; provided however that the Auction
4 Date may be adjourned from time to time by posting a notice of
5 adjournment on ADC’s website.

6 • **Registration Process:** Each party wishing to participate
7 in the Auction shall submit an on-line registration form on the
8 website established by ADC for the Auction to qualify as a
9 bidder. The registration form shall, among other things, (i)
10 contain such information as reasonably requested by ADC to
11 identify the potential bidder and (ii) require a credit card
12 authorization for payment of a deposit (in an amount to be
13 determined by ADC in consultation with the Trustee), which
14 deposit will either (a) not be charged, if the bidder is not the
15 winning bidder, (b) not be charged, if the bidder is the winning
16 bidder and timely consummates the sale pursuant to the Sale
17 Documents, or (c) may be charged, if the bidder is the winning
18 bidder but fails to timely consummate the sale, including fails to
19 execute the Sale Documents promptly following completion of
20 the Auction. The Secured Creditor shall be deemed to be a
21 qualified bidder at the auction and shall not be required to submit
22 a registration form or deposit. ADC, in consultation with the
23 Trustee, shall have the right to disqualify any potential bidder as a
24 qualified bidder if such bidder fails to complete the registration
25 process.

26 • **Bid Procedure:** Prior to the commencement of the first
27 Auction Date, the Secured Creditor shall provide a written notice
28 (the “Secured Creditor Notice”) to the Trustee and ADC of the
amount of its credit bid pursuant to Section 363(k) of the
Bankruptcy Code. The Secured Creditor Notice shall also include
the following information: (i) a minimum purchase price for the
sale of the Property acceptable to the Secured Creditor (the
“Reserve Price”); (ii) the Secured Creditor’s initial credit bid
amount to serve as the opening bid for the Auction (the “Opening
Bid”), which Opening Bid may be less than the Reserve Price;
and (iii) the bidding increment(s) (“Bidding Increments”) for each
round of bidding after the Opening Bid.² The Bidding Increment
may be adjusted upwards or downwards during the Auction for
each bidding round in the discretion of ADC to facilitate the most
competitive bidding. The Secured Creditor Notice shall be the
sole authorization required by the Trustee and ADC to consider

² If not otherwise set forth in the Secured Creditor Notice, the Reserve Price, the Opening Bid, and the initial Bidding Increments may be established by ADC in consultation with the Trustee and the Secured Creditor; provided, however that ADC may adjust Bidding Increments upwards or downwards during the Auction in its discretion.

1 the submission of the Opening Bid and any competing bid(s) by
2 the Secured Creditor pursuant to Section 363(k) of the
Bankruptcy Code.³

3 • **Winning Bid Amount:** The “Winning Bid Amount” shall
4 be the highest or otherwise best bid selected by the Trustee and
ADC, consistent with the Secured Creditor Notice, during the
5 Auction.

6 • **Buyer’s Premium:** In addition to the Winning Bid
7 Amount, the winning bidder shall pay a “Buyer’s Premium” equal
8 to the greater of \$2,500 or five (5%) of the Winning Bid Amount,
which shall be paid at closing directly to ADC as its commission
9 (the “Buyer’s Premium”). ADC shall not be entitled to any other
10 compensation. No Buyer’s Premium shall be paid when the
highest bid is the Secured Creditor’s credit bid. ADC shall not
11 split or otherwise share the Buyer’s Premium with any other
person or entity. The estate shall not be responsible or obligated
12 to pay any compensation to ADC.

13 • **Total Purchase Price:** The actual total purchase price
14 (“Total Purchase Price”) at closing will be equal to the Winning
Bid Amount plus the Buyer’s Premium

15 • **Listing Agent’s Commission:** The Listing Agent shall
16 receive up to 3% of the Winning Bid Amount for any sale that
closes to a third party buyer (the “Commission”). No
17 Commission shall be paid when the highest bid is the Secured
Creditor’s credit bid. The Listing Agent shall not be entitled to
18 any other compensation. The Listing Agent shall not split or
otherwise share the Commission with any other person or entity,
19 except that if the buyer is represented by a real estate agent, the
Listing Agent and buyer’s real estate agent may split or share the
20 Commission by agreement. The Secured Creditor agrees to pay
the Commission when earned and the estate shall not be
21 responsible or obligated to pay any compensation to the Listing
Agent.
22

23 • **Carve-Out Fund:** In order to provide for the payment of expenses in
24 this Chapter 7 case and to afford general unsecured creditors an
opportunity to participate in any recovery from the sale of the Property,
25 the Secured Creditor has agreed that, (1) if the Winning Bid Amount is
less than the allowed amounts owing to the Secured Creditor, then the
26 Bankruptcy Trustee will receive (a) 5% of the Winning Bid Amount plus

27
28 ³ Without limiting the foregoing, ADC shall be authorized to increase Bidding Increments automatically during the Auction on behalf of the Secured Creditor to the extent of the authorization provided for in the Secured Creditor Notice.

the Listing Agent's Commission; or (b) 5% of the Reserve, in the event the Secured Creditor enters the winning bid (collectively the "Standard Carve-Out"); provided however that the Standard Carve-Out shall never be less than \$7,500 exclusive of the Listing Agent's Commission, (2) if the Winning Bid Amount exceeds the amounts owing to the Secured Creditor, then the portion which exceeds the amounts owing to the Secured Creditor and any valid and substantiated junior secured lienholder (the "Surplus") shall be retained by the Chapter 7 Trustee and no carve-out shall be paid; however, if the Surplus is less than the Standard Carve-Out set out above by any amount ("Short Surplus Amount") then the Secured Creditor consents to paying the Bankruptcy Trustee an amount equal to the Short Surplus Amount; and (3) the Trustee shall be provided additional insurance by the Secured Creditor covering the Trustee and the estate from liability during the sale process and up through and including the closing on any sale. The cost of the insurance shall be billed directly to the Secured Creditor and the expense of the insurance shall not be paid by the estate, but shall be paid by the Secured Creditor.

- **Back-Up Bidder:** ADC shall be authorized, but not required, to accept the second highest bid submitted during the Auction as a "back-up" bid in the event that the winning bidder fails to consummate the sale transaction.⁴

- **Sale Documents:** Within 5 days following the closing of the Auction, the winning bidder shall execute a sale agreement or other applicable sale documents as required by the Trustee (the "Sale Documents").

19. Accordingly, the Trustee submits that the sale of the Property pursuant to the above Auction process is reasonable under Section 363(b) of the Bankruptcy Code.

B. The Sale of the Property Should Be Approved Free and Clear of All Interests

20. Pursuant to Section 363(f) of the Bankruptcy Code, the trustee may sell property free and clear of any interest in such property in an entity other than the estate if (1) permitted under applicable non-bankruptcy law; (2) the party asserting such interest consents; (3) the interest is a lien and the purchase price at which the property is to be sold is greater than the aggregate value of all liens on the property; (4) the interest is the subject of a bona fide dispute;

1 or (5) the party asserting the interest could be compelled, in a legal or equitable proceeding, to
2 accept a money satisfaction for such interest. *See In re Smart World Techs., LLC*, 423 F.3d 166,
3 169 n.3 (2d Cir. 2005) (“Section 363 permits sales of assets free and clear of claims and interests
4 . . . It thus allows purchasers . . . to acquire assets [from a debtor] without any accompanying
5 liabilities.”); *see also In re MMH Auto. Group, LLC*, 385 B.R. 347, 367 (Bankr. S.D. Fla. 2008).

6
7 19. The Trustee states that he shall satisfy Section 363(f)(2) of the Bankruptcy Code
8 because the Secured Creditor consents to a sale of the property under Section 363(f)(2) of the
9 Bankruptcy Code, free and clear of all liens, claims, encumbrances, and interests.

10 21. The Trustee requests that any creditor (other than the Secured Creditor) asserting an
11 interest or secured claim against the Property, after proper notice is given, be required to timely
12 assert and substantiate the basis for such asserted interest or secured claim, by filing and serving
13 responsive papers no later than 5 days prior to the hearing on the instant Motion, or the Court
14 will authorize the sale of the Property free and clear of any such asserted interest or security
15 interest, with such claims, at best, being treated as a general unsecured claim.⁵ Failure to object
16 after proper notice and opportunity to object is deemed consent. *See BAC Home Loans Servicing*
17 *LP v. Grassi*, 2011 WL 6096509 (1st Cir. BAP Nov. 21, 2011); *Citicorp Homeowners Servs.,*
18 *Inc. v. Elliott*, 94 B.R. 343 (E.D. Pa. 1988); *In re Gabel*, 61 B.R. 661 (Bankr. W.D. La. 1985);
19 *Futuresource LLC v. Reuters Ltd.*, 312 F.3d 281 (7th Cir.); *In re Harbour E. Dev., Ltd.*,
20 2012WL1851015, at *12 (Bankr. S.D. Fla., May 21, 2012).

21
22
23 22. Accordingly, under Section 363(f)(2) of the Bankruptcy Code, the Trustee,
24 seeks authority to sell the Property free and clear of all liens, claims, encumbrances, and interests
25 but otherwise “As-Is, Where-Is” and without representations or warranties of any type given by
26

27
28 ⁴ Acceptance of a “back-up” bid and proceeding to consummate a transaction with the “back-up” bidder shall be
without prejudice to any claim of the Trustee against the winning bidder for failing to proceed. All rights are
reserved.

1 the Trustee or his/her professionals. Notwithstanding that the Trustee will seek authority to
 2 execute all documents and instruments he/she deems reasonable, necessary and/or desirable to
 3 close the sale, the only documents that the Trustee shall be required to deliver to close shall be
 4 (a) a Trustee's Deed, and (b) a copy of the Final Sale Order.
 5

6 23. The Secured Creditor agrees to pay at closing (1) all outstanding real
 7 estate taxes, including any prorated amounts due for the current tax year; (2) all HOA fees
 8 required be paid under applicable state and federal law, including any post-petition HOA fees
 9 required to be paid under applicable state and federal law and (3) all closing costs excluding
 10 professional fees but including State Documentary Stamps for the entire closing price pursuant to
 11 Florida Statute Sections 201.01 and 201.02; (4) the carve out to the Trustee (as detailed in para.
 12 15 above). Any payments by the Secured Creditor as stated herein shall be subject to any and all
 13 limitations on the Secured Creditor's liability for any fees and costs under applicable law.
 14

15 **C. The Sale Will Be Undertaken by the Buyer in Good Faith**

16 24. Section 363(m) of the Bankruptcy Code protects a good faith purchaser's
 17 interest in property purchased from a debtor notwithstanding that the sale conducted under
 18 section 363(b) was later reversed or modified on appeal.
 19

20 25. The sale should be found to have been in good faith if the Trustee can
 21 demonstrate the transaction occurred at arm's-length and without fraud or collusion. *See Kabro*
 22 *Assocs. of West Islip, LLC v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 276
 23 (2d Cir. 1997) ("Typically, the misconduct that would destroy a purchaser's good faith status at a
 24 judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or
 25 an attempt to take grossly unfair advantage of other bidders." (citation omitted)); see *also In re*
 26 *Lorraine Brooke Associates, Inc.*, No. 07-12641 2007 WL 2257608 (Bankr. S.D. Fla. Aug. 2,
 27
 28

⁵ The Trustee reserves the right to dispute the alleged amount of any such claim both to validity and amount.

1 2007) (holding that a sale was entitled to the protections of Section 363(m) of the Bankruptcy
2 Code when it was based upon arm's length bargaining and without collusion).

3 26. The Trustee asserts that the sale of the Property pursuant to the Auction
4 will utilize a competitive and transparent marketplace that facilitates an arm's-length sale
5 without fraud or collusion. Accordingly, the Trustee respectfully requests that the Court find that
6 the purchaser(s) will be entitled to the protections of Section 363(m) of the Bankruptcy Code.

7 27. The Trustee further states that:

8 (a) the Trustee has determined, based upon a review of the schedules and
9 information derived from the 341 meeting, that there will likely be a meaningful distribution to
10 creditors based upon the understanding that the final sale price and the total dollar amount of
11 claims to be filed in this case are both unknown and can only be estimated at this time; and

12 (b) Given the information available at this time, the Trustee has made an
13 educated evaluation and determined that the proposed Sale is in the best interest of the estate and
14 its creditors.

15 28. The Trustee respectfully requests that this Court: (a) waive the 14 day stay
16 pursuant to Rule 6004(h), deem the sale order enforceable immediately upon entry, and authorize
17 the Trustee to close on the sale immediately upon entry of the Final Sale Order; (b) authorize the
18 Trustee to take all actions and execute all documents he/she deems reasonable, necessary and/or
19 desirable to effectuate the requested relief; (c) retain sole and exclusive personal subject matter
20 jurisdiction to implement, interpret and enforce the terms of the this Motion and the Final Sale
21 Order; and (d) adjudicate all claims, controversies and/or disputes arising from or related to the
22 proposed sale.
23
24
25
26
27
28

CONCLUSION

1 WHEREFORE, the Trustee respectfully requests that the Court enter orders approving the
2 Auction and Bid Procedures, the short sale of the Property pursuant to Sections 105 and 363 of
3 the Bankruptcy Code, approve the “Carve Out” and for such other and further relief as this Court
4 deems just and equitable

5 DATED: March 9, 2015

6
7 /s/ Geoffrey Wilson
8 Geoffrey Wilson, Trustee
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28